Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

82-672
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

WILLIE BARNES
Petitioner,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON H. HALL
401 Broadway
New York, New York

Of Counsel
HALL, CLIFTON & SCHWARTZ

QUESTIONS PRESENTED

1. Where a labor organization has unlawfully exacted payment of dues increases not adopted in accordance with §101(a)(3) of the Landrum-Griffin Act and a member has brought suit under the Act challenging such exaction, may the union, after suit is brought, retroactively legitimize the dues exaction by conducting a "ratification" vote, and thereby defeat the member's suit?

2. Where a proposed dues increase is put to a vote and approved by a segment of the membership of a labor organization, but in such vote another substantial segment of the membership is excluded and barred from voting, does such approval by a segment of the membership meet the requirements of §101(a)(3) for an increase of dues payable by all the members of the labor organization?

3. Where a union member has brought an action challenging a dues exaction as unlawful, and it is shown that his case is meritorious, is the member entitled to judgment declaring the dues exaction unlawful, and to his costs and fees?

THE PARTIES

The petitioner, Willie Barnes, is and for many years has been a member of respondent Local 29 of the Laborers' International Union of North America/Blasters, Drillrunners and Miners Union ("Local 29").

Respondent Local 29 is a local labor organization.

The individual respondents, Louis Sanzo, Amadio Petito and Don Maglione, Jr., are the President, Secretary-Treasurer and Vice President, respectively, of respondent Local 29.*

Respondent Local 29 is here sued both in its own name, pursuant to federal practice, and in the names of its President and Treasurer, pursuant to New York's General Association Law, §13.

---

*Sanzo and Petito continue to hold office as President and Secretary-Treasurer, respectively, although both are presently in prison for crimes related to the labor racketeering activities of Samuel "Big Sam" Cavalieri.

Cavalieri, whom Sanzo regarded as his "boss" (see: *United States v. Sanzo*, 673 F.2d 64, 66 (2d Cir. 1982), has been identified in testimony before District Judge Mark A. Constantino as a member of the Lucchese crime family; *United States v. Cavalieri, et al.*, CR-81-00149/150/151, Record at 58, 81 (ED NY Aug. 7, 1981). All three – Cavalieri, Sanzo and Petito – have been found by Judge Costantino to be persons "involved in organized crime"; *Ibid.*, Record at 3 (Aug. 14, 1981). Cavalieri was convicted of criminal contempt for refusing to answer questions concerning, *inter alia*, his awareness of illegal payoffs to Sanzo; *Ibid.*, Record at 3 (May 4, 1981). Sanzo was convicted of tax evasion and conspiracy to defraud the Government, in regard to moneys turned over to him by employers with whom Local 29 bargained; see: *United States v. Sanzo, supra.* Petito was convicted of criminal contempt and perjury in connection with his testimony denying his attendance at a meeting with Cavalieri; see: *United States v. Petito*, 671 F.2d 68 (2d Cir. 1982).

TABLE OF CONTENTS

	page
Questions presented	i
The parties	ii
Opinion below	1
Jurisdiction	2
Statutes involved	2
Statement	3
Reasons for granting the writ	5
I. The decision below is in conflict with decisions of the First and Fifth Circuits	5
II. The conflict poses serious questions regarding enforcement of the union members' "Bill of Rights"	7
III. The "Ratification" should be declared invalid prospectively, as well as retroactively	9
IV. The Court of Appeals has sanctioned a departure from the established and usual course of judicial proceedings	10
Conclusion	10
Appendix A	1a
Appendix B	7a
Appendix C	11a

TABLE OF AUTHORITIES CITED

Cases

Page

American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964) 8, 9

Hall v. Cole, 412 U.S. 1 (1973) 7, 8, 9

Hampden's Case, (1637) 3 S.T. 825 ..... 7, 8

Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972) 6

Landry v. Sabine Independent Seamen's Association, 623 F.2d 347 (5th Cir. 1980) 5, 6, 7

Local No. 2 v. International Brotherhood of Telephone Workers, 362 F.2d 891 (1st Cir. 1966), cert. denied 385 U.S. 947 ..... 5, 6, 7, 9

United States v. Cavalieri, et al., CR-81-00149/150/151 (ED NY Aug. 7, 1981, Aug. 14, 1981, May 4, 1981) ii

United States v. Petito, 671 F.2d 68 (2d Cir. 1982) ii

United States v. Sanzo, 673 F.2d 64 (2d Cir. 1982) ii

Statutes

28 U.S.C. §1254 (1) 2

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et. seq.:

Title I, 29 U.S.C. §§411-415 8

§101 (a) (3), 29 U.S.C. §411 (a) (3) ..... i, 2, 4, 5, 6, 7, 9, 10

§102, 29 U.S.C. §412 ..... 3, 4

Other Authorities

VI Holdsworth, A History of English Law (1927) 8

II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1960) 8

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

WILLIE BARNES
Petitioner,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 17, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 680 F.2d 3 and is attached hereto (App. 1a-6a) as Exhibit "A."

There was no opinion rendered by the United States District Court for the Southern District of New York. The latter's Order and Judgment, dismissing the complaint, is (App. 7a-10a) is attached hereto as Exhibit "B."

The Judgment of the Court of Appeals (App. 11a-12a) and the Order denying petition for rehearing (App. 12a-13a) are attached hereto as Exhibit "C."

JURISDICTION

The Opinion of the Court of Appeals and its Judgment were entered May 17, 1982. The Petition for Rehearing was denied by Order of July 14, 1982, making such judgment final.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and in accordance with Supreme Court Rule 17(a) and (c).

STATUTES INVOLVED

Section 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411(a)(3) provides as follows:

> (3) Dues, Initiation Fees, and Assessments. — Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except —

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members of the executive board or similar government body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §412, provides as follows:

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

Petitioner ("Barnes") is a member of respondent Local 29 ("the Union"), a local labor organization. He brought the suit

below on December 31, 1979, pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (or "LMRDA"), 29 U.S.C. §412, alleging that the Union and its officers had increased the rates of dues payable by members of the labor organization in violation of §101 (a) (3) of the LMRDA, 29 U.S.C. §411 (a) (3).

It is undisputed that in fact the Union had increased the rates of dues unlawfully, in violation of §101 (a) (3) (App. 2a-3a). Commencing in 1972, the Union and its officers had exacted from the Union's members a work-tax dues of 10¢ per hour, which the Union (and its officers) increased to 15¢ per hour in 1975, to 20¢ per hour in 1976 and to 25¢ per hour in 1977. The dues were checked off from members' paychecks. Neither the original 10¢ dues, however, nor any of the increases had been approved by secret ballot vote of the membership, as required by §101 (a) (3) of the LMRDA.

On March 8, 1980, in an oral pretrial order, the District Court directed that a ratification vote be held to determine whether the original increases in dues checkoff had been properly and freely voted upon (App. 8a). Four divisions for class voting were established, one for each dues increase. All members who had joined the Union after a dues increase had gone into effect were excluded from the division established for that increase. A "ratification" vote was then conducted on each increase, with all members who did not fall into a division excluded from voting on the increase in question. Each dues increase was approved in such voting by less than a two-to-one margin (App. 9a).

No trial or evidentiary hearing was held.

The District Court granted judgment for defendants, dismissing the Complaint without costs (App. 10a).

The Court of Appeals affirmed, holding that the "ratification" vote legitimized the original, unlawful dues collections, and was valid both prospectively and retroactively (App. 1a-6a). The Court distinguished its decision from those in other circuits holding that such ratification votes have no retroactive validity, on the ground that here the ratification vote was conducted with judicial sanction as a remedy for an LMRDA violation (App. 4a).

On the same ground, it rejected the argument that exclusion of a substantial segment of Local 29's membership (those who had become members since 1972) from participating in one or more of the ratification votes violated §101 (a) (3) (App. 5a-6a).

REASONS FOR GRANTING THE WRIT

The decision below holds that the Union's admittedly unlawful exaction of the dues increases from its members was legitimized, retroactively, by a "ratification" vote conducted after this suit was brought. That holding is in conflict with decisions of the courts of appeals of the First and Fifth Circuits. See: *infra*, pages 5 to 7.

The conflict presents serious questions concerning the protection of union members against arbitrary financial exactions under §101 (a) (3) of the LMRDA. The LMRDA provides *no* method for enforcement of §101 (a) (3) *other than* private suit by union members whose rights have been infringed by a violation. But under the decision below, a union's officials may, after a meritorious suit challenging an unlawful dues exaction has been brought, legitimize their unlawful exactions by conducting a "ratification" vote and may, thereby, obtain dismissal of the member's complaint and require him to bear his own costs and fees of litigation. It is thus extremely improbable that union members will, in the future, bring such suits. As a result, union officials are rendered free to flout, if they wish, the requirements of §101 (a) (3) and to exact dues payments from members in violation of the LMRDA, without fear that they will ever be held accountable. See: *infra*, pages 7 to 9.

I. The Decision Below Is in Conflict with Decisions of the First and Fifth Circuits.

The First and Fifth Circuits have held that a past, unlawful collection of a dues increase cannot be retroactively legitimized by a new "ratification" of the dues increase. *Local No. 2 v. International Brotherhood of Telephone Workers*, 362 F.2d 891, 896 (1st Cir. 1966), *cert. denied*, 385 U.S. 947; *Landry v. Sabine Independent Seamen's Association*, 623 F.2d 347, 350 (5th Cir. 1980).

In *Local No. 2*, an international union had adopted a dues increase not in accordance with §101 (a) (3) and had put the same into effect. Some ten months later, its convention approved the increase, and voted that the approval be retroactive to the date that the increase had gone into effect. Though holding that the approval was valid prospectively, the First Circuit rejected the convention's attempt to make it retroactive, holding that "This we do not countenance." *Ibid.*, 362 F.2d at 896.

The First Circuit noted, *Ibid.*, 362 F.2d at 896, that the union's ratification vote "must have been influenced, at least to some extent, by the fact that the 'assessment' for which it voted consisted of monies already collected." It concluded:

> Where the collection has been improperly achieved we think the membership must be given the benefit of the doubt. We think it more consonant with the intent of Congress to hold that dues increases illegally collected cannot be ratified, and that they should be refunded.

In *Landry*, *supra*, the defendant was a local union which had in 1975 increased its dues from $4 per month to $10 per month, without a secret ballot vote. In 1977, it ratified the increase by a secret ballot referendum. Following the First Circuit's decision in *Local No. 2*, *supra*, the Fifth Circuit held that the increase could not be ratified retroactively by the 1977 election; *Ibid.*, 623 F.2d at 350.

Other courts have followed the same principle in disapproving retroactive authorization for acts which, at the time they were committed, violated the LMRDA for lack of proper authorization; *cf. Kerr v. Shanks*, 466 F.2d 1271, 1276, n.3 (9th Cir. 1972), and cases there cited.

As a basis upon which to distinguish its decision from *Local No. 2* and *Landry*, *supra*, the Court below asserts that, in the instant case as distinct from the others, "the district court, pursuant to Section 102 of the LMRDA . . . , ordered the ratification vote as a remedy for an LMRDA violation" (App. 4a). The Court then goes on to suggest that, given the small size of the union and the amount of money involved, the District Court "could have con-

cluded" that refund of the unlawfully-collected dues would be "disadvantageous" to the membership (App. 5a).

The Court's assertion and suggestion, however, are contradicted by the facts recited in the opinion itself (App. 3a-4a). The District Court never reached or addressed the issue of what remedy might be appropriate for the LMRDA violations complained of by Barnes or whether refund would be "disadvantageous." Instead, it granted judgment for respondents (defendants below), dismissing Barnes's complaint. The "ratification" vote had been ordered *not* as a remedy but rather "to determine whether or not the previously initiated increase was properly and freely voted upon" (App. 8a).

Thus the fact that there had been an oral judicial direction for a "ratification" vote (unrecorded, save for a description of it in the Judgment, App. 8a to 10a) offers no basis for distinguishing the present case from *Local No. 2* and *Landry*, *supra*. The considerations expressed by the First and Fifth Circuits for denying retroactive validity to a "ratification" vote apply regardless of whether such "judicial sanction" is or is not involved.[1]

II. The Conflict Poses Serious Questions Regarding Enforcement of the Union Members' "Bill of Rights."

Title I of the LMRDA, 29 U.S.C. §§411-415 — the "Bill of Rights of Members of Labor Organizations" — was specifically designed by Congress to promote the "full and active participation by the rank and file in the affairs of the union"; the rights there enumerated were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership"; *cf. Hall v. Cole*, 412 U.S. 1, 7-8 (1973). Section 101(a)(3) forms a part of this framework, "by requiring participation by all members, either

[1]Other arguments offered by the Court below to distinguish *Local No. 2* and *Landry* have even less force. Thus, it is irrelevant that Barnes paid the unlawfully-adopted dues (App. 3a) for several years (App. 5a), by check-off authorization (see: App. 8a). A "waiver" argument based on such facts was explicitly rejected in *Landry*, *supra*, 623 F.2d at 350. Nor can the fact that recently-admitted members were excluded from participating in the "ratification" vote (see: App. 5a) avoid the conflict with *Local No. 2* and *Landry*.

directly or through their elected representatives, on certain union matters thought to be of special importance"; *cf. American Federation of Musicians v. Wittstein*, 379 U.S. 171, 181 (1964). Congress recognized that effective safeguards against arbitrary financial exactions, in unions as in the larger society, are an essential part of the "framework" of democratic rights generally. Compare: *Wittstein, supra*, 379 U.S. at 181, with *Hampden's Case*, (1637) 3 S.T. 825; and see: VI Holdsworth, *A History of English Law* (1927) 52-54.

Following the lead of Senator McClellan, Congress looked upon the rights guaranteed to union members by what is now Title I of the LMRDA as "the tools they can use themselves" to democratize and clean up their unions. See: II NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1961) ("Leg. Hist."), 1102-1103. The original McClellan proposal was replaced by a "Kuchel Substitute," *cf. American Federation of Musicians v. Wittstein, supra*, 379 U.S. at 180, which carried the concept of reliance upon the members' initiative one step further: it relied upon private suit by union members themselves, instead of upon suit by the Secretary of Labor, to enforce the provisions of the "Bill of Rights of Members of Labor Organizations." This reliance upon private suits was, as Senator Kuchel put it, "one of the major changes in [his] proposal"; II Leg. Hist. 1232. Senator Clark, a fellow-sponsor of the Kuchel Substitute, explained, II Leg. Hist. at 1233,

> [I]t takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts.

Necessarily, the success of Congress's scheme depends upon the ability and readiness of union members to vindicate Title I rights through private litigation. Thus placing its reliance upon private suits by union members, Congress was concerned that the plaintiff-member should *not* be required to "shoulder the burden of litigation costs himself." See: *Hall v. Cole, supra*, 412 U.S. at 11, n.19. For the same reason, Congress favored the allowance of counsel fees to plaintiff-members in Title I litigation. *Ibid.*, 412

U.S. at 12-13. In quoting with approval from the opinions of lower courts, *Ibid.*, 412 U.S. at 13-14, this Court has observed that *not* to award fees to such a plaintiff "would be tantamount to repealing the Act itself by frustrating its basic purpose."

In this case, Barnes—like the plaintiff in *Hall v. Cole, supra*—sought to effectuate Congress's purpose by bringing suit to vindicate rights that Congress had guaranteed to him and to his fellow members when it enacted Title I. His suit was "undisputed[ly]" meritorious: App. 2a-3a. The District Court, however, never considered awarding him his costs or attorney's fees. Worst of all, it denied him judgment in his favor and granted judgment, instead, for defendants.

The decision below holds that it does not matter how meritorious the member's suit may be. Judgment is to be granted for defendants and the member's complaint is to be dismissed, without costs or fees to the member, if and as soon as a ratification vote retroactively approves the dues increase.

In the face of such a prospect, few members would be so imprudent as to seek to effectuate §101 (a) (3) at their own, individual expense. The decision below is thus tantamount to repealing §101 (a) (3) by frustrating its basic purpose.

III. The "Ratification" Should be Declared Invalid Prospectively, as well as Retroactively.

In *Local No. 2, supra*, the First Circuit held that the ratification vote there involved, since it met the requirements of §101 (a) (3), was valid in its prospective, though not in its retroactive, effect. Here, however, the ratification vote did *not* meet §101 (a) (3)'s requirements, since, by the District Court's direction, many members (those who joined since 1972) were excluded from participation. Such exclusion is not provided for by §101 (a) (3). This Court noted in *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 181 (1964) that §101 (a) (3) (B) "requir[es] participation by *all* members" (*emphasis added*). So does §101 (a) (3) (A).

The Court below upholds prospective effect of the "ratification" vote by terming it a "remedy" for an LMRDA violation

(App. 6a). As noted *supra*, that misstates the facts, since the District Court did *not* find, or seek to remedy, any LMRDA violation. Instead, it dismissed the complaint which alleged such a violation.

IV. The Court of Appeals Has Sanctioned a Departure from the Established and Usual Course of Proceedings.

In the usual and established course of judicial proceedings, a plaintiff whose suit is meritorious is entitled to judgment in his favor. It is undisputed here that Barnes's suit was meritorious (App. 2a-3a). Yet here the District Court denied him judgment and granted judgment, instead, for defendants, dismissing his complaint (App. 10a). Obviously, in so doing, it departed from the established course of judicial proceedings. The Court of Appeals has so far sanctioned such departure as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BURTON H. HALL
401 Broadway
New York, New York 10013
Attorney for Petitioner

Of Counsel
HALL, CLIFTON & SCHWARTZ

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 939—August Term, 1981

(Argued April 19, 1982 Decided May 17, 1982)

Docket No. 81-7890

WILLIE BARNES,

Plaintiff-Appellant,

—v.—

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/ BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,

Defendant-Appellees.

Before:

WATERMAN, FRIENDLY and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Ward, *J.*, dismissing appellant's complaint which challenged the collection by a union local of certain dues payments.

Affirmed.

BURTON HALL, New York, New York (Hall, Clifton and Schwartz, New York, of counsel), *for Appellant*.

DENNIS CROWLEY, New York, New York (Corcoran and Brady P.C., New York, New York, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

Willie Barnes appeals from an order of the United States District Court for the Southern District of New York, Ward, *J.*, dismissing his complaint which challenged the receipt by local 29, Laborers' International Union of North American/Blasters, Drillrunners, and Miners Union ("Union"), of certain dues payments from members. We affirm.

BACKGROUND

In 1972, Union officials increased membership dues by ten cents per hour of employment. Union officials also increased dues by five cents per hour of employment in each of 1975, 1976 and 1977. It is undisputed that because the Union failed to conduct secret ballot

votes of the membership, each of the increases violated section 101 (a)(3)(A) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(3)(A) (1976).

On December 31, 1979, Barnes, a Union member who paid the unlawfully increased dues, filed suit seeking injunctive relief, an accounting, and a refund. By pre-trial order, Judge Ward directed that a retroactive ratification vote be taken on each of the challenged increases. The court limited voting on each of the challenged increases to workers who were Union members on the dates that the increases took effect, including members who had since retired. These voting classes approved all of the dues increases, each by slightly less than a two-to-one margin. The court then entered an order dismissing Barnes' complaint and Barnes filed this appeal.

Barnes claims that the votes taken at the district court's direction could not retroactively cure the defects in the illegal dues increases and that the district court's order improperly denied some present Union members the right to vote.

DISCUSSION

1. *The Retroactive Vote*

Barnes first claims that a membership vote approving dues increases cannot be applied retroactively. He argues that if dues increase were improperly implemented, a subsequent, properly conducted ratification vote can apply prospectively only. To support his position, Barnes cites several cases, including *Landry* v. *Sabine Independent Seamen's Association*, 623 F.2d 347, 350 (5th Cir.

1980); *Local No.2, International Brotherhood of Telephone Workers* v. *International Brotherhood of Telephone Workers*, 362 F.2d 891 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *White* v. *Local 942, Laborers' International Union*, 90 F.R.D. 368, 373 (D. Alaska 1981); *Gates* v. *Dalton*, 441 F. Supp. 760, 764-65 (E.D.N.Y. 1977) (Neaher, *J.*; *Peck* v. *Associated Food Distributors*, 237 F. Supp. 113, 115 (D. Mass. 1965).

We find Barnes' argument unpersuasive. Each of the cases he cites is distinguishable on the important ground that the ratification vote challenged was initiated by the union without judicial sanction. In this case, the district court, pursuant to section 102 of the LMRDA, 29 U.S.C. § 412, ordered the ratification vote as a remedy for an LMRDA violation. Section 102 provides in pertinent part:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United State for such relief (including injunctions) as may be appropria e.

In construing section 102, the Supreme Court has said:

> [Section] 102 was premised upon the fact that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting almost infinite variety," and § 102 was therefore cast as a broad mandate to the courts to fashion "appropriate" relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their errors to 'grant relief according to the necessities of the

case.' " *Gartner* v. *Soloner*, 384 F.2d 348, 353 (CA3 1967).

Hall v. *Cole*, 412 U.S. 1, 10-11 (1973) (footnote omitted).

In this case, the district court was faced with a suit seeking a refund of dues unlawfully collected over a period of several years. Appellant did not file suit until more than seven years after the Union's first LMRDA violation. The court was careful to ensure that the individuals voting on the retroactive approval of each dues increase were, to the extent possible, the same as those who could have voted when the increases were first implemented. Given the small size of the Union and the amount of money involved, the district court could properly have concluded that ordering a refund of all unlawfully collected dues would be as disadvantageous to the membership as to the Union officials. We believe that the remedy was fair, reasonable and "appropriate" within the meaning of section 102 of the LMRDA.

II. *The right to Vote*

Barnes also contends that even if a retroactive ratification vote can, in some circumstances, be proper, the district court in this case violated the LMRDA by disenfranchising some present Union members. Barnes relies upon the language of section 101(a)(3)(A) of the LMRDA, 29 U.S.C. § 411(a)(3)(A), which provides that union dues shall not be increased except by a majority vote of the "members in good standing." Because the district court limited the class of voters for each of the ratification votes to those who were union members when the unlawful dues increase were originally implemented, Barnes argues that some present "members in good standing" were improperly denied their right to vote.

Once again, we reject Barnes' position. The issue is whether, given the Union's LMRDA violations, the remedy ordered was within the district court's authority. Section 101(a)(3)(A) merely sets forth the procedure a union local must follow to increase dues. It does not limit the district court's authority to design an appropriate remedy for an LMRDA violation. *See* Section 1, *supra*.

We find no error in the district court's exclusion of some present Union members from the voting classes in this case. It was not unreasonable to disallow voting by present Union members who were not members at the time the dues increases took effect.

In sum we find that on the facts of this case the retroactive ratification votes and the designation of voting classes ordered by the district court were fair, reasonable and "appropriate" under section 102 of the LMRDA.

Affirmed.

Appendix B

Order and Judgment of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civ. 7070
(RJW)

WILLIE BARNES
Plaintiff,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Defendants.

This cause having been brought on by plaintiff by complaint filed December 31, 1979, and duly served upon the defendants on January 4, 1980, seeking an order granting a preliminary and permanent injunction, enjoining and restraining the defendants and their agents from collecting dues from plaintiff and other members of his class in excess of $56.00 per month, requiring defendants to give plaintiff an accounting of all dues collected since 1972 and indicate how those moneys were spent, directing that all illegally collected dues be refunded to the membership with interest and that attorney's fees and costs be awarded to plaintiff, and

Defendant's answer having been duly served upon plaintiff on January 23, 1980, denying the essential allegations of the complaint, and

This matter having been reassigned to the Honorable Robert J. Ward from the Honorable Lloyd F. MacMahon on February 25, 1980, and

This court having entered a pre-trial order on March 8, 1980, directing a secret-ballot retroactive dues ratification vote to determine whether or not the previously initiated increase in the dues checkoff was properly and freely voted upon, and

This court having established four divisions for class voting based on membership in the union on July 1, 1972, July 1, 1975, July 1, 1976, and July 1, 1977, the date on which the dues increases became effective, and limited to those members, including retired members, affected by the dues increase in each year, and eligible to vote in those elections, and

This court having permitted plaintiff's attorney three to five meetings with members of the Union at important job sites where the officers of the Union and plaintiff's attorney could meet with members and explain the purposes of the election to ratify or reject the dues increases, and

This court having directed one Union meeting to be held at which the question of the dues increases could be presented to the members by plaintiff's attorney, and

Defendants having fully complied with plaintiff's requests for production and copying of documents to the satisfaction of the court, and

Defendants having fully complied with the directives of this court to permit plaintiff's attorney to attend the Union meeting and visit five job sites to present plaintiff's views to the membership of the Union, and

An in-person, secret ballot vote having been scheduled for May 28, 1981, and

The Honest Ballot Association having been retained by the defendant Union as an impartial party to conduct the secret-ballot vote, and

Lists of eligible voters for each division of voters and sample ballots having been supplied to plaintiff's attorney, and

A Notice of Election and letters from plaintiff and defendant explaining respective views on the proposal to be submitted to

the membership having been approved by both parties and duly mailed to each eligible member of the Union, and

The mailing of said notices and letters to each eligible member of the Union having been personally supervised, verified and certified by defendants' attorney to be fairly and accurately completed without prejudice to either party, and

A separate and distinct ballot having been prepared for each year in question, and

A secret in-person vote having been conducted and supervised by the Honest Ballot Association at the Union Hall, located at 137-25 37th Avenue, Flushing, New York, from 6-8 P.M. on Thursday, May 28, 1981, and

A secret mail-in ballot having been mailed to each eligible voter who did not vote in person at the May 28, 1981, meeting on June 21, 1981, by the Honest Ballot Association, pursuant to agreement between the attorneys for both parties, and

The in-person and mail-in ballots having been tallied by the Honest Ballot Association on July 20, 1981, in the presence of the attorneys for both parties, and

The proposal on each ballot submitted to the voters having stated:

> "Whether the supplemental dues increase of $.10, $.05, $.05, $.05 respectively per hour effective July 1, 1972, July 1, 1975, July 1, 1976, July 1, 1977 respectively should be approved retroactively,"

and

The results of the secret ballot vote having been as follows:

(a) 1972	YES-99	NO-55
(b) 1975	YES-100	NO-54
(c) 1976	YES-111	NO-59
(d) 1977	YES-119	NO-60

and

The results of the secret-ballot vote having been certified on July 21, 1981, by Murray Schwartz, President, Honest Ballot Association, that the majority voted to APPROVE the dues increase retroactively effective July 1, 1972, July 1, 1975, July 1, 1976,

and July 1, 1977, respectively, and that the vote was conducted fairly and honestly, and

This court having been satisfied that the secret-ballot in-person and mail-in vote which approved retroactively the supplemental dues increases of $.10, $.05, $.05, $.05, respectively, per hour effective July 1, 1972, July 1, 1975, July 1, 1976, and July 1, 1977, respectively, was conducted fairly and honestly, and decisively expresses the wishes of those members eligible to vote on the respective dues increases, and

The body of voters on each dues increase vote having been the same body of voters eligible to vote on each dues increase when promulgated, and

This court having heard the arguments of counsel for both parties, having reviewed all relevant documents, and being fully advised, it is

ORDERED, ADJUDGED AND DECREED:

that the plaintiff's action is dismissed with prejudice and without costs.

Dated: October 30, 1981

s/ROBERT J. WARD
UNITED STATES DISTRICT JUDGE

Judgment Entered November 2, 1981

s/RAYMOND F. BURGHARDT,
CLERK

Appendix C

Judgment of the Court Below

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of May one thousand nine hundred and eighty-two

Present:

HON. STERRY R. WATERMAN
HON. HENRY J. FRIENDLY
HON. THOMAS J. MESKILL
Circuit Judges,

No. 81-7890

WILLIE BARNES
Plaintiff-Appellant,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be

and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by ARTHUR HELLER,
Deputy Clerk

Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of July, one thousand nine hundred and eighty-two.

No. 81-7890

WILLIE BARNES
Plaintiff-Appellant,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the plaintiff-appellant, Willie Barnes,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk

by s/ FRANCIS X. GINDHART,
Chief Deputy Clerk